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Timothy C. Kelly

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ARTICLE

MANDATORY ARBITRATION OF CIVIL RIGHTS CLAIMS IN THE WORKPLACE: NO ENFORCEABILITY WITHOUT EQUIVALENCY

Lucy T. France*

Timothy C. Kelly**

* J.D. University of Montana School of Law, B.A., University of California, Berkeley. Lucy T. France is a partner with the law firm of Garlington, Lohn & Robinson, PLLP in Missoula, Montana. She is engaged in a general trial and appellate practice, and is a member of the firm's Employment Law Practice Group. Ms. France regularly advises and counsels employers on developing and implementing personnel policies and practices that adhere to state and federal employment laws.

** J.D. Chicago Kent School of Law, B.A., University of Wisconsin, Milwaukee. Timothy C. Kelly is a sole practitioner. Prior to 1998, he served as the hearing examiner/administrative law judge and then as legal counsel for the State of Montana Human Rights Commission. In 2002, he was lead counsel with Andrew I. Huff (Helena, Montana) in one of the few Montana cases litigating in federal and state courts whether a pre-employment mandatory arbitration agreement was enforceable against a former employee who had filed discrimination and retaliation charges. Mr. Kelly's practice is limited to representing plaintiffs or claimants in civil rights and discrimination cases in federal and state courts, and before federal and state agencies.

INTRODUCTION

The United States Supreme Court recently clarified that the strong policy under the Federal Arbitration Act to enforce arbitration agreements applies to agreements between workers and employers. There is an equally well-established policy to ensure that employees remain free from unlawful discrimination in the workplace. This article explores those competing policies and how the federal courts and the Montana Supreme Court have applied them. Section I provides a brief background and key provisions of the Federal Arbitration Act and the Act's preemption of state laws. Section II addresses the *Circuit City* cases in depth and the implications of mandatory arbitration in the workplace. Section III examines the enforceability of arbitration agreements under Montana law, and Section IV discusses other federal principles and their application to the arbitration of employment disputes. Section V considers the consequences of implementing arbitration procedures for civil rights claims in the workplace. This article concludes that federal court decisions have extended the reach of the FAA to nearly all employment agreements, but that enforcement of mandatory arbitration provisions depends on equivalent protection of an employee's substantive rights in the arbitral forum.

A host of issues are raised by the adoption of mandatory pre-dispute arbitration agreements in the workplace. An understanding of the issues is important to effectively draft or review enforceable arbitration policies, or litigate questions raised by a potentially unenforceable pre-dispute arbitration agreement. This article is also useful for non-lawyers who share concerns about workplace civil rights issues and about the effectiveness of alternatives to the courtroom as a forum for resolving workplace disputes, especially those involving alleged violations of state or federal civil rights laws.

I. FEDERAL ARBITRATION ACT

A. Background to the Federal Arbitration Act

Congress passed the Federal Arbitration Act (FAA) in 1925¹

1. United States Arbitration Act of February 12, 1925, ch. 213 § 1, 43 Stat. 883. The Supreme Court first upheld its constitutionality as a valid exercise of congressional power under the Commerce Clause in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263

to counteract the traditional judicial resistance to arbitration agreements. The resistance of the American courts to arbitration agreements can be traced back to the English common law.² Through the FAA, Congress intended to “place arbitration agreements upon the same footing as other contracts.”³ The FAA established a “federal policy favoring arbitration.”⁴ In short, Congress mandated that courts enforce arbitration agreements.

The FAA has been construed as a substantive law which applies equally to state courts enforcing state statutes.⁵ It applies whether a claim is based on federal or state law.⁶ The Commerce Clause⁷ gives Congress the authority to pass the FAA. The United States Supreme Court has been consistent in nullifying attempts by state legislatures and state courts to diminish the enforceability of arbitration agreements.⁸ Congress effectively withdrew the power of the states to require a judicial forum for the resolution of claims which contracting parties agree to resolve by arbitration.⁹

*B. FAA Preemption of State Laws: Doctor's Associates, Inc., v. Casarotto*¹⁰

There is no express provision in the FAA to pre-empt state

(1932). The FAA was later reenacted in 1947. 9 U.S.C. §§ 1-14 (1947) (current version at 9 U.S.C. §§ 1-16 (2003)).

2. In *Southland Corp. v. Keating*, the Court explained that “[t]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction This jealousy survived for so [long] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt the precedent was too strongly fixed to be overturned without legislative enactment” 465 U.S. 1, 13 (1984) (quoting H.R. REP. NO. 68-96, at 1-2 (1924)).

3. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

4. *Shearson/Am. Express, Inc., v. McMahon*, 482 U.S. 220, 226 (1987) (citation omitted).

5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (holding courts determine whether parties agreed to arbitration under FAA’s “substantive law of arbitrability”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

6. *Shearson/Am. Express*, 482 U.S. at 226.

7. U.S. CONST., art. I, § 8, cl. 3. See also *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 405 (1967). The FAA “is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.” *Id.* (citing H.R. REP. NO. 68-96 at 1 (1924); S. REP. NO. 68-536 at 3 (1924)).

8. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

9. *Id.* at 10.

10. 517 U.S. 681 (1996).

laws.¹¹ The intent of Congress was not to occupy the entire field of arbitration.¹² It was designed to require "courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."¹³ The application of the Act has pre-empted state laws which not only undermine the goals and policies of the FAA, but also those that treat arbitration clauses differently from other contractual provisions.

The *Doctor's Associates, Inc. v. Casarotto* case highlights the power under the FAA to invalidate any state laws which treat arbitration provisions less favorably than other contractual provisions.¹⁴ The Montana Supreme Court upheld a state statute that invalidated any arbitration clause unless the front page of the contract containing the clause had a notice in underlined typed letters that the agreement was subject to arbitration.¹⁵ In upholding the statute, the Montana Supreme Court reasoned that the notice requirement did not undermine the goals or policies of the FAA.¹⁶ The United States Supreme Court disagreed, finding that the state statute was invalid because it treated arbitration clauses in contracts more harshly than other contractual provisions.¹⁷ Under that regimen, state laws which diminish parties' rights to enforce arbitration agreements like any other contract, will be void under the FAA.

C. Statutory Text

The key provisions in the FAA are Sections 2, 3, and 4.¹⁸ Section 2 provides for the enforceability of arbitration provisions in contracts "evidencing a transaction involving commerce."¹⁹ This language is construed broadly to encompass all contracts, including employment contracts, not expressly exempted by the FAA.²⁰ "Commerce" is defined in Section 1 of the FAA.²¹ The

11. *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

12. *Id.*

13. *Id.* at 478.

14. 571 U.S. 681 (1996).

15. *Casarotto v. Lombardi*, 274 Mont. 3, 901 P.2d 596 (1995).

16. *Casarotta*, 274 Mont. at 6-8, 901 P.2d at 597-99.

17. *Doctor's Assocs.*, 517 U.S. at 687-88.

18. *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 400 (1967).

19. 9 U.S.C. § 2 (2003).

20. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-82. *See also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113-14 (2001). Although most contracts fall within the ambit of the FAA, one should still do an initial analysis of whether a specific contract is covered. In *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 200-01

Act's broad reach coincides with the historically expansive scope of the Commerce Clause.²² Section 1 also contains the exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²³ In *Circuit City* the Court made clear that this exemption is narrow and does not exclude contracts of employment as a class.²⁴

Section 2 also contains what has perhaps become the most important provision in the Act with regard to states' rights, as well as the rights of workers, consumers, small business owners and other individuals.²⁵ The provision provides for the enforceability of an arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract."²⁶

Under section 3, a party can apply for a stay of court proceedings²⁷ pending arbitration under a valid arbitration agreement.²⁸ Section 4 provides an avenue for a party to seek a court order compelling arbitration.²⁹

Sections 5 through 8 are procedural. Section 5 provides a default method for appointing an arbitrator if the agreement does not specify a method.³⁰ Section 6 states that an application to a court under the FAA shall be made and heard in the same

(1956), the Supreme Court held that an arbitration clause in an employment contract was not subject to the FAA because there was no maritime transaction and no transaction involving interstate commerce. The Supreme Court opinion did not recount the nature of the work governed by the contract. In *City of Cut Bank v. Tom Patrick Const.*, 290 Mont. 470, 963 P.2d 1283 (1998), the Montana Supreme Court held that because the construction contract at issue was purely local and also did not involve interstate commerce, it was outside the coverage of the FAA.

21. 9 U.S.C. § 1 (2003).

22. *Allied-Bruce*, 513 U.S. at 274.

23. 9 U.S.C. § 1. See also *Pike v. Burlington N. R.R. Co.*, 273 Mont. 310, 903 P.2d 1352 (1995) (finding the FAA did not apply to railroad employee's discrimination claim).

24. See discussion *infra* Part II.

25. See discussion *infra* Part III.

26. 9 U.S.C. § 2.

27. A stay can be brought under the FAA in both state and federal courts. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 10 (1983). The FAA does not itself provide jurisdiction to a federal court.

28. 9 U.S.C. § 3 (2003).

29. 9 U.S.C. § 4 (2003). Generally, the question of arbitrability—whether the parties have submitted a particular dispute for arbitration—is an issue for the courts. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 591 (2002). Other procedural questions, even if they bear on the final disposition, are still decided by the arbitrator. *Id.* at 592.

30. 9 U.S.C. § 5 (2003).

manner provided for motions.³¹ Section 7 gives arbitrators subpoena powers.³² Section 8 applies to specific procedures regarding admiralty proceedings.³³ Sections 9 through 13 pertain to arbitration awards, including the limited grounds upon which to vacate or modify arbitrator decisions.³⁴

II. CIRCUIT CITY, INC. V. ADAMS

A. *Employment Contracts Not Exempt from FAA*

In *Circuit City v. Adams*, the Supreme Court definitively expanded the number of employees who could be subject to arbitration of disputes arising from their employment.³⁵ Prior to *Circuit City v. Adams*, most circuit courts of appeals had narrowly construed Section 1 of the FAA to exempt only contracts of employment involving transportation workers, but not other employment contracts.³⁶ The *Circuit City* decision was significant, because it laid to rest any argument that contracts of employment generally could not be subject to arbitration agreements. At the same time, the decision highlighted the tension between state laws enacted to protect fundamental rights of citizens and the federal power under the FAA to enforce agreements between employees and employers to arbitrate their disputes.

The arbitration agreement in *Circuit City* was contained in the application for employment. One of the prerequisites to employment with Circuit City Stores was that employees had to agree to settle:

[A]ll previously unasserted claims, disputes or controversies

31. 9 U.S.C. § 6 (2003). This section was intended to expedite court proceedings concerning matters pertaining to arbitration. *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365-66 (2d Cir. 1965).

32. 9 U.S.C. § 7 (2003).

33. 9 U.S.C. § 8 (2003).

34. Section 9 provides a procedure for confirming arbitration awards in court. 9 U.S.C. § 9 (2003). Section 10 sets forth the grounds upon which a United States District Court may vacate an arbitration award. 9 U.S.C. § 10 (2003). Section 11 sets forth the limited circumstances in which a district court may modify or correct an arbitration award. 9 U.S.C. § 11 (2003). Section 12 provides a party with three months to file a notice of a motion to vacate, modify or correct an arbitration award. 9 U.S.C. § 12 (2003). Section 13 sets forth the procedure when an order for entry of judgment is filed with the court and states that a judgment on an arbitration award "may be enforced as if it had been rendered in an action in the court in which it is entered." 9 U.S.C. § 13 (2003).

35. 532 U.S. 105 (2001).

36. *Id.* at 109, 111 (citations omitted).

arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.³⁷

If an employment applicant did not sign the agreement or withdrew consent to the arbitration provision within three days, then the applicant was not eligible for employment at Circuit City.³⁸

The plaintiff, St. Clair Adams, completed the application and signed the arbitration agreement. Two years later, Adams filed a lawsuit in state court against Circuit City and three co-workers alleging sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress under the California Fair Employment and Housing Act.³⁹ Adams also filed a discrimination claim based on sexual orientation under California statutory law. Adams sought to recover compensatory, punitive, and emotional distress damages for the alleged harassment during his employment.⁴⁰

Circuit City responded by filing a petition in federal district court to stay the state court proceedings and compel arbitration pursuant to the arbitration agreement Adams had signed.⁴¹ The district court granted the petition to compel arbitration.⁴² Adams appealed to the Ninth Circuit. The Court of Appeals reversed the district court. It found that the arbitration agreement was a contract of employment and therefore exempt from the FAA.⁴³ The court relied on *Craft v. Campbell Soup Co.* which it had decided six months earlier.⁴⁴ In *Craft v. Campbell Soup Co.*, the Ninth Circuit held that the FAA did not apply to employment contracts.⁴⁵

37. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 n.1 (9th Cir. 1999) (*Circuit City I*), *rev'd*, 532 U.S. 105 (2001).

38. *Id.* at 1071.

39. *Circuit City v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002) (*Circuit City II*), *cert. denied*, 535 U.S. 1112, 122 S. Ct. 2329 (2002).

40. *Id.* at 892.

41. *Id.*

42. *Id.*

43. *Circuit City I*, 194 F.3d at 1071-72.

44. *Id.* at 1070.

45. *Id.* at 1071-72 (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir.

The United States Supreme Court granted the Circuit City petition for certiorari on the issue of whether all contracts of employment are excluded from the FAA.⁴⁶ The issue concerned interpretation of Section 1 of the FAA which provides that the Act does not apply “to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁴⁷ The Ninth Circuit had concluded that the exemption in Section 1 excluded all employment contracts from the FAA.⁴⁸ The Supreme Court rejected that statutory interpretation. The Court held that “the [S]ection 1 exclusion provision [should] be afforded a narrow construction,”⁴⁹ and limited the Section 1 exclusion to contracts of employment for transportation workers.⁵⁰

The Court in *Circuit City* limited the issue and its holding to the very narrow interpretation of Section 1 of the FAA. It acknowledged that there were still issues surrounding the tension between the protection of fundamental rights of individuals and the broad pre-emptive effect of the FAA.⁵¹ The Court noted that a large number of *amici* briefs were filed including the attorneys general of 21 states with concerns about the FAA’s intrusion upon the policies of the separate states.⁵² Arguments had been made that the FAA should not be interpreted so as to interfere with the states’ role in regulating

1999)).

46. *Circuit City Stores, Inc. v. Adams*, 529 U.S. 1129 (2000). The FAA does not provide an independent basis for federal jurisdiction. “Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute . . .” *Circuit City I*, 194 F.3d at 1071. In *Circuit City*, the federal district court originally exercised jurisdiction on the basis of diversity of citizenship. *Circuit City Stores, Inc., v. Adams*, No. C98-0365, 1998 U.S. Dist. LEXIS 6215, at 6 (N.D. Cal. 1998).

47. 9 U.S.C. § 1.

48. *Circuit City I*, 194 F.3d at 1071-72.

49. *Circuit City*, 532 U.S. at 118.

50. *Id.*

51. An issue arguably left open in *Circuit City* is whether Title VII prohibits employers from compelling prospective employees to sign pre-dispute arbitration agreements. *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994 (9th Cir. 2002)(Pregerson, H., dissenting). In *Luce*, the district court had enjoined a law firm from compelling a job applicant to arbitrate Title VII claims and from enforcing its existing arbitration agreements against employees. *Luce*, 122 F. Supp.2d 1080 (C.D. Cal. 2000). The Court of Appeals vacated the injunction and remanded for entry of judgment in favor of the employer. *Luce*, 303 F.3d at 1008. A majority of the Ninth Circuit judges vacated that panel decision and voted for the en banc court to rehear the matter. *Luce*, 319 F.3d 1091, 1092 (9th Cir. 2003).

52. *Id.* at 121-22.

employment relationships⁵³ or with the states' powers "to protect employees from contracting away their right to pursue state-law discrimination claims in court."⁵⁴

The court declined to directly address these concerns. It was not inclined to overrule or diminish the sweeping holdings in *Southland*⁵⁵ or *Allied-Bruce*,⁵⁶ or limit the broad reach of the FAA.⁵⁷ The Court went on to justify its position by touting its view of the advantages of arbitration in the context of employment litigation.⁵⁸ It reiterated that mandatory arbitration does not limit substantive rights, but merely changes the forum.⁵⁹

B. Enforceability of Arbitration Agreements Subject to § 2 of FAA

After the Court determined Section 1 of the FAA applied to the employment contract at issue, the case was returned to the Ninth Circuit to decide whether the district court had erred in compelling Mr. Adams to arbitrate his claims against Circuit City.⁶⁰ On remand, the Ninth Circuit evaluated the employer's arbitration agreement under the standard found in § 2 of the FAA, i.e., whether it was unenforceable on "grounds at law or in equity for the revocation of any contract." The court of appeals wasted little time in finding Circuit City's arbitration agreement not enforceable, because it "functions as a thumb on Circuit City's side of the scale should an employment dispute ever arise between the company and one of its employees."⁶¹

Section 2 of the FAA has become the most important safeguard under the Federal Arbitration Act for employees who are subject to mandatory arbitration clauses. It provides that such agreements are enforceable "save upon such grounds as

53. The Equal Employment Opportunity Commission (EEOC) had taken the position that an employer could not require mandatory arbitration of workplace discrimination claims as a condition of being hired. U.S. EEOC, Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997), available at <http://www.eeoc.gov/docs/mandarb.html>.

54. *Circuit City*, 532 U.S. at 122.

55. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

56. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

57. *Circuit City*, 532 U.S. at 122-23.

58. *Id.* at 123.

59. *Id.*

60. *Id.* at 124.

61. *Circuit City II*, 279 F.3d at 892.

exist at law or in equity for the revocation of any contract.”⁶² This exception offers some opportunity for balancing the tension between the federal policy in favor of arbitration and the countervailing law and policy concerned with individual rights. Under Section 2, state law contract defenses may operate to invalidate an arbitration provision.⁶³

In *Circuit City*, the Ninth Circuit found that the mandatory arbitration provision was an unconscionable contract of adhesion.⁶⁴ It noted that the employer drafted the standard-form contract and provided the employee with no opportunity to negotiate the terms if he wanted to work at Circuit City.⁶⁵ The court further discussed the provisions which were substantively unconscionable because they denied the employee the benefit of the full range of statutory remedies. The contract was one-sided. The employee was required to arbitrate all claims against the employer, but the agreement did not require Circuit City to arbitrate claims it might have against the employee. The agreement limited the remedies available to employees who had valid claims. Employees were required to pay one-half of the arbitrator’s fees. A strict one-year statute of limitations on employee claims effectively denied workers of the benefit of the continuing violation doctrine.⁶⁶ The Ninth Circuit ultimately reversed the district court’s order compelling arbitration on the grounds that the mandatory arbitration provision was an unconscionable and unenforceable contract of adhesion under state law.⁶⁷

Despite the strong federal policy endorsing arbitration, serious concerns remain about the enforceability of mandatory arbitration in the workplace. The concerns are most apparent with regard to mandatory arbitration of discrimination and civil rights claims. The Supreme Court’s decision in *Circuit City* made clear that challenges to the validity of mandatory arbitration provisions in employment contracts cannot rely on the exemption language found in Section 1 of the FAA. Future challenges must be based on other grounds such as the substantive requirements of Section 2 of the FAA.

62. 9 U.S.C. § 2.

63. *Circuit City II*, 279 F.3d at 892 (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

64. *Id.* at 894-95.

65. *Id.* at 893.

66. *Id.* at 893-95.

67. *Id.* at 896.

III. MANDATORY WORKPLACE ARBITRATION AGREEMENTS ARE SUBJECT TO MONTANA CONTRACT LAW

A. Montana Arbitration Policy Parallels FAA Policy

The importance of Section 2 of the FAA and its recognition of state contract law defenses is apparent when viewing the interplay between Montana's approach to arbitration and the effect of the FAA on that approach. Both federal and state laws apply in determining the enforceability of an arbitration provision in an employment contract.⁶⁸ The FAA preempts state laws which conflict with the Act.⁶⁹ Generally, Montana law is consistent with the FAA, because Montana has long favored settlement of disputes by arbitration.⁷⁰ The Montana Court has acknowledged the federal policy favoring arbitration.⁷¹ It has endorsed the notion of equal footing of arbitration provisions.⁷² Even before *Circuit City*, the Montana Supreme Court upheld arbitration provisions in employment contracts.⁷³

In 1985, the Montana Legislature passed the Uniform Arbitration Act.⁷⁴ The purpose of the Act is consistent with the purpose of the FAA: "[T]o validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide efficient procedures when judicial assistance is necessary."⁷⁵ The FAA preempts the Uniform Arbitration Act only when the application of the state act is inconsistent with

68. *Iwen v. U.S. West Direct*, 1999 MT 63, ¶ 23, 293 Mont. 512, ¶ 23, 977 P.2d 989, ¶ 23.

69. *Keystone, Inc. v. Triad Systems Corp.*, 1998 MT 326, ¶ 23, 292 Mont. 229, ¶ 23, 971 P.2d 1240, ¶ 23.

70. *Walker v. Helena Ass'n of Realtors, Inc.*, 2000 MT 343, ¶ 9, 303 Mont. 224, ¶ 9, 15 P.3d 414, ¶ 9; *Bennett v. Mahoney*, 161 Mont. 510, 515, 507 P.2d 1057, 1060 (1973); *McIntosh v. Hartford Fire Ins. Co.*, 106 Mont. 434, 78 P.2d 82 (1938).

71. *Chor v. Piper, Jaffray & Hopwood, Inc.*, 261 Mont. 143, 148, 862 P.2d 26, 29 (1993); *Vukasin v. D.A. Davidson & Co.*, 241 Mont. 126, 785 P.2d 713 (1990); *Larson v. Opie*, 237 Mont. 108, 771 P.2d 977 (1989).

72. *Iwen*, ¶ 24.

73. *Vukasin*, 241 Mont. at 132, 785 P.2d at 718.

74. MONT. CODE ANN. §§ 27-5-111 to 324 (2002). The Act is based on the Uniform Arbitration Act, UNIF. ARBITRATION ACT, 7 U.L.A. 5 (1985), promulgated by the National Conference of Commissioners on Uniform State Laws in 1985. The act has been enacted in 25 other states and the District of Columbia. *Id.* (Chapter Compiler's Comments).

75. MONT. CODE ANN. Title 27, Chapter 5 (Chapter Commission Notes, Commissioner's Prefatory Note).

the FAA.⁷⁶

B. Arbitration Agreements Must Be Enforceable Contracts under Montana Law

Although state law cannot restrict the application of arbitration agreements, state law still governs “issues concerning the validity, revocability, and enforceability of contracts generally.”⁷⁷ State standards for the enforceability of a mandatory arbitration agreement must be met. The policy favoring arbitration agreements extends only to valid arbitration agreements.⁷⁸ The section of the FAA which opens the door for state law protections of employee rights, as discussed previously,⁷⁹ is Section 2.⁸⁰

Contract defenses under state law may invalidate mandatory arbitration agreements.⁸¹ Recent decisions of the Montana Supreme Court indicate that it will seriously consider defenses objecting to the validity of mandatory arbitration clauses.⁸² After *Casarotto*, Montana courts are acutely aware of treating arbitration agreements the same as other contracts.⁸³ The Montana Supreme Court has carefully held the line between following precedent under the FAA that favors arbitration and upholding established state policies that protect fundamental rights of citizens, including their access to the courts.

76. *Doctor's Assocs.*, 517 U.S. at 688.

77. *Keystone*, ¶ 23.

78. *Mueske v. Piper, Jaffrey & Hopwood, Inc.*, 260 Mont. 207, 859 P.2d 444, 448 (1993) (affirming denial of motion to compel arbitration where district court found arbitration agreement invalid because pre-dispute arbitration clause incorporated rules of New York Stock Exchange but defendant firm then failed to follow those rules in obtaining agreement with customer). *See also* *Kingston v. Ameritrade, Inc.*, 2000 MT 269, ¶ 15, 302 Mont. 90, ¶ 15, 12 P. 3d 929, ¶ 15 (holding that district court erred in failing to consider and rule upon investor's claim that arbitration clause was invalid because it incorporated standard industry rules which plaintiff alleged were not followed by defendant firm).

79. *See supra* Part II.B.

80. 9 U.S.C. § 2. The party resisting the arbitration bears the burden of proving that Congress intended to preclude arbitration of the claims at issue. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92 (2000).

81. *Doctor's Assocs.*, 517 U.S. at 686-87.

82. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, 310 Mont. 123, 54 P.3d 1; *Iwen*, 1999 MT 63, 293 Mont. 512, 977 P.2d 989. *See also* *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001), *cert. denied* 534 U.S. 133 (2002).

83. *See* *Keystone, Inc. v. Triad Sys. Corp.*, 1998 MT 326, 292 Mont. 229, 971 P.2d 1240.

General contract principles apply to arbitration provisions.⁸⁴ As with any contract, arbitration agreements are construed against the drafter.⁸⁵ If an employer requires an arbitration agreement, it must follow the policies and procedures stated in the agreement or else the arbitration requirement is in jeopardy of being declared void. In *Chor v. Piper, Jaffray & Hopwood, Inc.*,⁸⁶ the brokerage house drafted the arbitration agreement and provided that it was governed by the rules of the National Association of Securities Dealers (NASD).⁸⁷ One of the requirements in the NASD rules was that the customer must be provided with a copy of any arbitration clause and required to sign an acknowledgment of receipt.⁸⁸ When the broker did not provide the customer with a copy of the arbitration provision, in accordance with NASD rules, the Court held that the provision was invalid.⁸⁹

Arbitration agreements, which contain illegal contractual provisions under Montana law,⁹⁰ will be held invalid. In *Keystone, Inc. v. Triad Systems Corp.*,⁹¹ the Court held that the provision in an arbitration agreement requiring the arbitration to take place outside of Montana was void, because it violated state contract law.⁹² The holding was not inconsistent with the FAA, because the invalid provision was not particular to arbitration agreements. Any choice of forum provisions in contract agreements that violate Montana law will likely be held unenforceable.⁹³

C. Analyzing the Agreement in Terms of Adhesion Contracts

Drafters of arbitration agreements should be particularly

84. *Iwen*, ¶ 26.

85. MONT. CODE ANN. § 28-3-206 (2002), cited in *Mueske*, 260 Mont. at 216, 859 P.2d at 449-50 (1993); *Eschenbacher v. Anderson*, 2001 MT 206, 306 Mont. 321, 34 P.3d 87.

86. 261 Mont. 143, 862 P.2d 26 (1993).

87. *Id.* at 148, 862 P.2d at 29.

88. *Id.*

89. *Id.* The Court relied on *Mueske*, in which it had held "... that failure to comply with controlling law incorporated into an arbitration agreement, such as an NASD rule, renders a pre-dispute arbitration clause invalid." *Id.* (citing *Mueske*, 260 Mont. 207, 859 P.2d 444).

90. Title 28, Chapter 2, part 7 of the Montana Code sets forth illegal contractual provisions.

91. 1998 MT 326, 292 Mont. 229, 971 P.2d 1240.

92. *Keystone*, ¶ 22.

93. See *id.*; MONT. CODE ANN. § 28-2-708 (2002).

aware of state law regarding the enforceability of adhesion contracts. After *Circuit City*, challenges to arbitration provisions in employment contracts will likely be brought on the grounds that the provision constitutes an unlawful contract of adhesion.⁹⁴ The Montana Supreme Court has yet to rule on such a challenge in an employment contract.⁹⁵ However, the principles that the state supreme court has applied to consumers should also apply to employees.⁹⁶

A contract of adhesion is drafted solely by one party and provided on a take-it-or-leave-it basis.⁹⁷ The receiving party has no opportunity to negotiate the terms of the contract and has no realistic options.⁹⁸ Whether a contract is a contract of adhesion can be a factual issue.⁹⁹ The nature of the contracting process is important to determine whether the arbitration provision is a contract of adhesion.¹⁰⁰ If an employer can show that it negotiated a fair pre-dispute arbitration agreement with an

94. See, e.g., *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002); *Circuit City II*, 279 F.3d 889 (9th Cir. 2002); *Cooper v. MRM Inv. Co.*, 199 F. Supp.2d 771, 777-78 (M.D. Tenn. 2002). Most recently, the Ninth Circuit held another *Circuit City* pre-dispute arbitration agreement unenforceable because it was permeated with unconscionable provisions. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1169 (9th Cir., 2003).

95. In *Vukasin v. D.A. Davidson & Co.*, 241 Mont. 126, 785 P.2d 713 (1990), which dealt with an arbitration provision in an employment contract, the issue of whether the contract was a contract of adhesion was not discussed.

96. Employees are like consumers in the sense that they lack any real bargaining power when presented with mandatory pre-dispute arbitration agreements. Many potential conflicts can arise between federal policy favoring arbitration and protection of substantive consumer rights protected by federal and state law. *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003); But see, *Boomer v. A.T.&T. Corp.*, 309 F.3d 404 (7th Cir., 2002) (finding A.T.&T. service agreement was binding contract and that FAA preempted customers' claim that arbitration clause was unconscionable).

97. *Iwen*, ¶ 28.

98. *Id.* See *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶¶ 23-24, 310 Mont. 123, ¶¶ 23-24, 54 P.3d 1, ¶¶ 23-24 (citing CORBIN ON CONTRACTS, § 1.4 at 13 (1993)).

99. In *Ticknor v. Choice Hotels Int'l, Inc.*, the court discussed the lack of a factual record indicating that the parties had negotiated the contract at issue which contained the arbitration provision. 265 F.3d 931, 939-40 (2001), *cert. denied* 534 U.S. 1133 (2002). There is an implication that if the record showed that the contract had not been submitted merely on a "take it or leave it" basis, it would not have been deemed a contract of adhesion. *Id.* at 940.

100. *Iwen*, ¶ 28. The Ninth Circuit, interpreting California law, has held that the lack of meaningful negotiations between an employer and an employee who does not have equal bargaining power renders the contract procedurally unconscionable. *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 784 (9th Cir. 2002). Under California law, in order to render a contract unenforceable under the doctrine of unconscionability, it must be both procedurally and substantively unconscionable. *Id.* at 783. Therefore, finding a contract procedurally unconscionable would be akin to the initial finding that a contract is a contract of adhesion under the Montana test.

employee, a mandatory pre-dispute arbitration provision might not be construed as a contract of adhesion.¹⁰¹ The analysis would then end. The agreement would be enforceable against the employee and the employer.

As a practical matter, arbitration clauses in employment contracts are often contracts of adhesion.¹⁰² Most employees lack bargaining power. Rarely do non-management level employees negotiate the terms of their employment at arms length. For the rank and file employee, an arbitration clause will be contained in a handbook or even a job application provided to an employee at the outset of the employment. Failure of the employee to sign on to the handbook or application, and thereby agree to the terms and conditions including mandatory arbitration, will result in no employment.¹⁰³

D. Testing Whether the Agreement Is Enforceable

A contract is not revocable simply because it is a contract of adhesion.¹⁰⁴ A contract of adhesion will be treated differently, because "traditional assumptions associated with contract law are unfounded."¹⁰⁵

Once it is determined that an agreement is a contract of

101. Cf. *Langager v. Crazy Creek Prods., Inc.*, 1998 MT 44, 287 Mont. 445, 954 P.2d 1169. In *Langager*, the Montana Supreme Court recognized the importance meaningful negotiation played regarding the enforcement of policies imposed upon employees. It held that where the record showed that there had been bargained-for consideration between the employer and employees regarding new terms in an employment handbook, the new terms in the handbook were enforceable against the employee. *Langager*, ¶ 21. A similar analysis might be applied with respect to contracts.

102. See *Kloss*, ¶ 62 (Nelson, J., specially concurring) (discussing recent trend of corporations to implement binding arbitration provisions that people, including employees are forced to accept).

103. See *Id.* ("These are the adhesion contracts that ordinary citizens . . . must accept if they want to acquire . . . employment . . ."); *Ferguson*, 298 F.3d at 784 (rejecting argument that employees were not forced to sign agreement, because they could find work elsewhere). See also *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 778 n.4 (M.D. Tenn. 2002) (noting the take-it-or-leave-it choice most prospective employees face when an employer requires them to sign mandatory pre-dispute arbitration agreements at the outset of their employment) (citing John A. Gray, *Have the Foxes Become The Guardians of the Chickens? The Post-Gilmer Legal Status of Predispute Mandatory Arbitration as a Condition Of Employment*, 37 VILL. L. REV. 113, 115 (1992)).

104. *Kloss*, ¶ 24 (citing *Passage v. Prudential-Bache Secs., Inc.*, 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (1986)).

105. *Id.* The Court explained that contracts of adhesion are treated differently because unlike contracts bargained for at arms length, contracts of adhesion contain terms "dictated by one party to another who has no bargaining power and no realistic options." *Id.*

adhesion, the next step in the analysis is to determine: (1) if the contract provision was not within the reasonable expectations of the non-drafting party, i.e., the employee; or (2) if it was within the reasonable expectation of the employee, whether it is unduly oppressive, unconscionable, or against public policy.¹⁰⁶ An arbitration clause in an adhesion contract is unenforceable that fits into either category.

1. Not Within Expectations of Parties

A prerequisite to a valid arbitration agreement is that both parties are aware of the contractual provision.¹⁰⁷ Obtaining an employee's signature acknowledging agreement to the arbitration provision will not by itself insulate the employer from a challenge that the arbitration clause was not within the reasonable expectations of the parties. Analysis of whether a provision in an adhesion contract is within the non-drafter's reasonable expectations should begin with a review of *Kloss v. Edward D. Jones & Co.*¹⁰⁸

Alice Kloss was a 95-year-old widow who purchased investment advice and assistance from the defendant investment brokerage firm.¹⁰⁹ During the course of her relationship with the brokerage firm, Kloss signed two agreements, both of which contained mandatory pre-dispute arbitration clauses.¹¹⁰ Kloss agreed to a third contract to open a charitable trust account. The contract itself was not signed, but Kloss signed a detachable signature card which acknowledged that she had received a copy of the contract. The contract contained a mandatory pre-dispute arbitration clause.¹¹¹ Several months later, Kloss filed a complaint in state district court alleging the brokerage firm and securities broker violated securities laws, engaged in deceptive business practices, were negligent, breached their fiduciary obligations and committed fraud.¹¹²

The brokerage firm filed a motion to compel arbitration and stay the district court proceedings.¹¹³ Eventually, the issue of

106. *Iwen*, ¶ 27; *Kloss*, ¶ 23.

107. *Iwen*, ¶ 27.

108. 2002 MT 129, 310 Mont. 123, 54 P.3d 1.

109. *Id.*, ¶ 6.

110. *Id.*, ¶ 7.

111. *Id.*, ¶ 9.

112. *Id.*, ¶ 12.

113. *Kloss*, 2002 MT 129, & 12, 310 Mont. 123, & 12, 54 P.3d 1, & 12.

whether the mandatory arbitration provisions in the contracts were enforceable reached the Montana Supreme Court.¹¹⁴ Kloss argued that the arbitration provision was part of a contract of adhesion. She argued that by signing the contract she had not waived her constitutional right to a jury trial.¹¹⁵ The record showed the securities broker did not require Kloss to read the agreement, but instead he explained what he believed to be the significant features of the account.¹¹⁶ He did not consider the arbitration provision to be a significant provision of the contract.¹¹⁷

The brokerage firm argued the clause was enforceable. The supreme court disagreed. The court noted that the arbitration provision involved a waiver of at least two constitutional rights.¹¹⁸ Finding first the contract was a contract of adhesion, the court held that the arbitration clauses were unenforceable because they were not within the reasonable expectations of the non-drafting party.¹¹⁹ Evidence that Kloss signed the contract was not sufficient to show that the provision was within her reasonable expectations.¹²⁰

The special concurrences in *Kloss* provide additional guidance as to how the court will analyze whether an arbitration provision in an adhesion contract meets the first prong of the enforceability test. The special concurrence by Justice Leaphart suggests that an employer's practice in obtaining signatures on an arbitration provision is critical. He notes that an important factor in deciding *Kloss* was the fact that Kloss signed the signature card not after, but before being provided with a copy of the arbitration agreement.¹²¹ The special concurrence by Justice Nelson suggests that the court will strictly scrutinize any contractual provision which has the effect of waiving a person's

114. *Id.*, ¶ 17.

115. *Id.*, ¶ 22.

116. *Id.*, ¶ 19.

117. *Id.*

118. *Kloss*, 2002 MT 129, ¶ 28, 310 Mont. 123, ¶ 28, 54 P.3d 1, ¶ 28. The supreme court found that the arbitration provision involved a waiver of the right to access to the courts pursuant to Article II, section 16 of the Montana Constitution and the right to a jury trial pursuant to Article II, section 26 of the Montana Constitution. *Id.* In addition, the court noted that plaintiff had waived her right to "findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal" *Id.*

119. *Id.*, ¶¶ 30, 32.

120. *Id.*, ¶ 29.

121. *Id.*, ¶ 46 (Leaphart, J., specially concurring).

constitutional rights, including arbitration agreements.¹²² The lesson from *Kloss* is that if an employer seeks to implement an effective pre-dispute mandatory arbitration provision, it must have a procedure by which it clearly and unequivocally informs the employees of the rights they are waiving.¹²³

2. Oppressive or Unconscionable

An unconscionable or unduly oppressive contract is one in which "the contractual terms are unreasonably favorable to the drafter and . . . there is no meaningful choice on the part of the other party regarding acceptance of the provisions."¹²⁴ In *Iwen*, the court found that the arbitration provision was unconscionable, because it lacked mutuality. It bound the consumer to arbitrate any dispute with the company, but not the company, which could proceed in district court against the consumer.¹²⁵ Further, the agreement limited the remedies a consumer could obtain, while providing protection to the company by allowing it attorney fees and costs if the consumer took legal action.¹²⁶ The arbitration provision in *Iwen* was clearly one-sided and unreasonably favored the drafter.

In *Kloss*, the court did not reach the issue of whether the arbitration provision was unconscionable. The court did suggest factors to consider in analyzing whether an arbitration agreement is unconscionable. The analysis in *Kloss* suggests that the following could be indicators of potential unconscionability or oppressiveness in arbitration agreements governing employment claims: (1) the pool of potential arbitrators contains a disproportionate number of persons who repeatedly serve as arbitrators for the employer and therefore may have a bias against rendering a decision that would end

122. *Id.*, ¶ 71 (Nelson, J., specially concurring).

123. At first blush, this stricter scrutiny of arbitration provisions might seem to violate the rule from *Casarotto*. However, it is consistent with *Casarotto* and does not run afoul of the FAA, because the court has and will strictly scrutinize all contractual provisions which effectuate a waiver of constitutional rights. See *Keystone, Inc. v. Triad Sys. Corp.*, 1998 MT 326, ¶ 26, 292 Mont. 229, ¶ 26, 971 P.2d 1240, ¶ 26 (holding forum selection provision invalid does not violate FAA, because the court treats forum selection provisions in arbitration contracts in the same manner as forum selection provisions in other contracts).

124. *Iwen v. U.S. West Direct*, 1999 MT 63, ¶ 31, 293 Mont. 512, ¶ 31, 977 P.2d 989, ¶ 31 (quoting *Leibrand v. Nat'l Farmers Union Prop. & Cas. Co.* 272 Mont. 1, 12-13, 898 P.2d 1220, 1227 (1995)).

125. *Id.*

126. *Id.*

further contractual opportunities with the employer; (2) the filing fees for an arbitration exceed the filing fees for a complaint in district court;¹²¹²⁷ (3) the employee might be responsible for all or a portion of the arbitrator's fees, and such fees make it prohibitive for an employee to bring a small claim to arbitration; (4) the arbitration proceedings are "shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices"; (5) the arbitrator's decision can substantially deviate from the provisions of applicable law; (6) the arbitrator is not bound by the facts; (7) employees have limited opportunities to discover the facts necessary to prove their claims.¹²⁸

Equivalency should be foremost in the mind of a person drafting a pre-dispute arbitration agreement in an employment contract. If employees are denied the substantive rights they would have by taking a dispute to court, or are reasonably deterred by the arbitration provisions, the agreement will be suspect.

3. *Contrary to Public Policy*

If an arbitration provision in an adhesion contract is within the reasonable expectations of the non-drafting party and it is not unduly oppressive or unconscionable, it may still be unenforceable if it violates public policy.¹²⁹ The Montana Supreme Court has held that a provision in an arbitration agreement requiring a party to arbitrate a dispute outside of Montana violates public policy.¹³⁰

The court has defined public policy as follows:

[P]ublic policy can be enunciated by the constitution, the legislature or the courts at any time and whether there is a prior expression or not the courts can refuse to enforce any contract which they deem to be contrary to the best interest of the citizens

127. In *Ferguson v. Countrywide Credit Indus., Inc.*, the Ninth Circuit agreed with the California Supreme Court which held that valid arbitration provisions cannot require employees to bear expenses which would not be required in a civil action. 298 F.3d 785, 785 (9th Cir. 2002). A provision allowing the arbitrator the discretion to award the prevailing party fees and costs was insufficient to cure the unconscionability of the provision. *Id.* The court reasoned that the up front costs to bring a claim and the threat that the employee may not be able to recover fees, may deter employees from bringing valid claims. *Id.* at 785-86 n.8; see also *Ingle*, 328 F.3d at 1177.

128. *Kloss*, ¶ 30.

129. Unconscionable adhesion contracts violate public policy. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (stating "an unconscionable arbitration clause in an adhesion contract is unenforceable in Montana as a matter of public policy."), *cert. denied*, 534 U.S. 1133 (2002).

130. *Keystone, Inc. v. Triad Sys. Corp.*, 1998 MT 326, 292 Mont. 229, 971 P.2d 1240.

as a matter of public policy.¹³¹

Other types of contracts such as those containing exculpatory clauses,¹³² requiring subrogation of medical payment benefits,¹³³ containing overly restrictive covenants not to compete,¹³⁴ or waiving an employee's right to be paid overtime compensation¹³⁵ are unenforceable because they violate public policy. Generally, any contractual waiver of the benefit of a law enacted for a public reason is void.¹³⁶ It follows that an arbitration provision requiring an employee to waive her right to be free from unlawful discrimination would be unenforceable as a violation of public policy.¹³⁷

IV. OTHER FEDERAL PRINCIPLES APPLICABLE TO THE ARBITRATION OF WORKPLACE CIVIL RIGHTS CLAIMS

Aside from the general federal policy favoring the arbitration of disputes and the applicability of state contract law defenses in executing that policy, additional federal legal principles apply to the arbitration of employment disputes. These principles intersect with attempts to enforce or invalidate an arbitration agreement covering civil rights claims. They serve to balance the FAA policy promoting arbitration as an

131. *Anaconda Fed. Credit Union # 4401 v. West*, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971).

132. *See, e.g., Miller v. Fallon County*, 222 Mont. 214, 721 P.2d 342 (1986).

133. *See, e.g., Youngblood v. Am. States Ins. Co.*, 262 Mont. 391, 866 P.2d 203 (1993).

134. *See, e.g., Dobbins, DeGuire ¶ Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 708 P.2d 577 (1985).

135. *See, e.g., Lewis v. B&B Pawnbrokers, Inc.*, 1998 MT 302, ¶ 25, 292 Mont. 82, ¶ 25, 968 P.2d 1145, ¶ 25; *see also Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945) (finding a contractual waiver of FLSA rights void as against public policy).

136. *Phoenix Physical Therapy v. Unemployment Ins. Div., Contributions Bureau*, 284 Mont. 95, 104, 943 P.2d 523, 528 (1997); *Amsterdam Lumber, Inc. v. Dyksterhouse*, 179 Mont. 133, 140, 586 P.2d 705, 709 (1978).

137. For example, an arbitration provision which discourages an employee from filing a complaint of unlawful discrimination with the Montana Human Rights Bureau (MHRB) might violate public policy. One of the central purposes of the Montana Human Rights Act (MHRA) is to prevent and eliminate unlawful discrimination, a laudable goal. *See Laudert v. Richland County Sheriff's Dep't*, 2000 MT 218, ¶¶ 56-57, 301 Mont. 114, ¶¶ 56-57, 7 P.3d 386, ¶¶ 56-57. The MHRA requires the Department of Labor or the Human Rights Commission, upon a finding of unlawful discrimination, to enjoin the discriminating party from further acts of unlawful discrimination. MONT. CODE ANN. § 49-2-506 (2002). It allows the Department or the Commission to impose affirmative relief to minimize the likelihood of future discrimination. *Id.* Any agreement that would prevent an employee from taking steps to allow the state agency to prevent those unlawful practices or to vindicate the public's interests would be contrary to state public policy.

acceptable forum to resolve disputes and the fundamental public policy protecting individual employee rights, particularly civil rights established by constitutional or statutory law.

*A. No Prospective Waivers of Fundamental Civil Rights:
Alexander v. Gardner-Denver*

Thirty years ago, at the end of the first decade of modern civil rights legislation,¹³⁸ the United States Supreme Court announced in *Alexander v. Gardner-Denver Co.*,¹³⁹ that “there can be no prospective waiver of an employee’s rights under Title VII.”¹⁴⁰ The Court considered such an observation to be “clear,” perhaps obvious. It held that a union member was not precluded from asserting his statutory rights under Title VII outside the grievance procedures contained in his union’s collective bargaining agreement.

Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. “In these circumstances, an employee’s rights under Title VII are not susceptible of prospective waiver.”¹⁴¹

138. The following were among the civil rights legislation enacted during this period: Title II of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified at 42 U.S.C. § 2000a (1964)) (prohibiting discrimination in public accommodations); Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1964)) (prohibiting employment discrimination); Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (codified at 29 U.S.C. § 621 (1967)); Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284 (codified at 42 U.S.C. § 3601 (1968)) (prohibiting housing discrimination); Equal Credit Opportunity Act of 1968, Pub. L. 90-321, 88 Stat. 1521 (codified at 15 U.S.C. § 1691 (1968)) (prohibiting discrimination in credit transactions); Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1972)) (amending Title VII); Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 374 (codified at 20 U.S.C. § 1681 (1972)) (prohibiting discrimination in education); Rehabilitation Act of 1973 Pub. L. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 701 (1973)) (prohibiting disability discrimination); Montana Human Rights Act, Sec. 1, Ch. 201, L. 1965 (codified at Mont. Code Ann., tit. 49, ch.2 (1965)).

139. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

140. *Id.* at 51.

141. *Id.* at 51-52, followed in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (holding that individual’s rights under the FLSA are not waivable by collective bargaining agreement and therefore are to be redressed in court). See also *Pike v. Burlington N. R.R. Co.*, 273 Mont. 390, 395-96, 903 P.2d 1352, 1355 (1995); *Wilko v. Swan*, 346 U.S. 427 (1953). The *Barrentine* holding might not foreclose individual agreements to arbitrate FLSA claims. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002) (mandatory arbitration agreement between employer and individual

Although *Gardner-Denver* addressed the rights of a union member to grieve and arbitrate a breach of the labor contract independently from her right as an individual to be free from illegal discrimination, the courts have applied the underlying policy prohibiting prospective waivers of fundamental civil rights to a variety of contracts unrelated to either union contracts or arbitration agreements.¹⁴²

*B. Arbitration of Discrimination Claims Permissible If
"Change In Forum, Not in Rights": Gilmer v. Interstate
Johnson/Lane Corp.*

Seventeen years after *Gardner-Denver* was decided, the Supreme Court addressed a variation on the same question in *Gilmer v. Interstate Johnson/Lane Corp.*¹⁴³ The Court considered the enforceability of an agreement with an individual nonunion employee to arbitrate claims under the Age Discrimination in Employment Act.¹⁴⁴ Relying on a newly invigorated deference to the Federal Arbitration Act, the Court denied access to the courts to an investment broker who, as a condition of his employment with the brokerage company defendant, had registered with a stock exchange that required mandatory arbitration of any claims arising from employment in the securities industry. In its ruling, the Court did not reject the

employee not precluded by FLSA); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1458 (11th Cir. 1997) (holding that individual employee who signs enforceable pre-dispute arbitration agreement may be required to arbitrate FLSA claims).

142. See, e.g., *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 745 (1st Cir. 1996) ("Non-assistance covenants which prohibit communication with the EEOC are void as against public policy"); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991) (voiding settlement agreement in a civil action with provision prohibiting plaintiff from seeking or holding elective office); *Williams v. Vukovich*, 720 F.2d 909, 926 (6th Cir. 1983) (finding consent decree unenforceable with respect to waiver of right to file action regarding possible future acts of discrimination); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) (holding a provision in separation agreement and release unenforceable which prohibited filing a charge with EEOC) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987) (finding a "promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement")); *Moses v. Burleigh County*, 438 N.W.2d 186 (N.D. 1989) (employer cannot require as condition of employment contract that employee waive right to be free from illegal discrimination); *Campbell v. Connelie*, 542 F. Supp. 275, 279 (N.D.N.Y. 1982) (prospective age discrimination claim not waived by joining retirement plan regardless of terms of pension agreement). Cf., *Pike*, 273 Mont. at 401, 903 P.2d at 1359 (following *Gardner-Denver* in holding that Railway Labor Act did not mandate arbitration of the claimant's Title VII claims).

143. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

144. *Id.* at 23.

"no prospective waiver" principle enunciated in *Gardner-Denver*,¹⁴⁵ but it also did not abandon the presumption in favor of arbitrating disputes announced in *Mitsubishi*.¹⁴⁶ Instead, the *Gilmer* Court underscored the divergence it had seen in *Mitsubishi* between waiving statutory rights and waiving the forum. In doing so, the Court found little or no distinction¹⁴⁷ between the types of statutory rights addressed in *Mitsubishi* (anticompetitive claims under the Sherman Act) and the civil rights protected by the ADEA or other antidiscrimination laws.

Gilmer provides the base line principle regarding the enforceability of mandatory arbitration agreements covering workplace civil rights claims. The arbitration requirement can only change the forum and not produce a loss in "substantive" rights. By agreeing to arbitrate civil rights claims arising out of employment, an employee "does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."¹⁴⁸ In *Circuit City*, the Court confirmed the *Gilmer* principle and found it applicable to a civil rights claim under state law.¹⁴⁹

This "change of forum, not in rights" dichotomy seems forthright, simple, easy to grasp. In practice, that is a fiction.

1. Unresolved Issues Concerning Change of Forum versus Loss of Rights

Despite the principle articulated in *Gilmer*, issues still remain about whether the procedures in various arbitral forums yield a net loss of substantive rights. In *Gilmer*, the plaintiff

145. Most courts have consistently applied *Gardner-Denver* to preclude compulsory arbitration of civil rights claims based on a collective bargaining agreement. See, e.g., *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Felt v. Atchison, Topeka & Sante Fe Ry. Co.*, 60 F.3d 1416 (9th Cir. 1995). But see *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), cert. denied, 519 U.S. 980 (1996) (finding no distinction between arbitration clauses in individual versus collective agreements). The Supreme Court has confirmed the principal that an arbitration clause in a union contract does not waive an employee's individual right to litigate a claim under the ADA. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998). It has left for another day whether a "clear and unmistakable" waiver of a federal forum for discrimination claims in a collective bargaining agreement will or will not be enforceable. *Id.* at 81-82.

146. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

147. *Gilmer*, 500 U.S. at 26 ("having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" (quoting *Mitsubishi*, 473 U.S. at 628)).

148. *Id.*

149. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001).

securities dealer challenged the adequacy of arbitration procedures.¹⁵⁰ The Court summarily dismissed Gilmer's arguments as nothing more than speculation and a reflection of the bias that the FAA was intended to correct.¹⁵¹

Other challenges fared no better. Gilmer argued that the private nature of the arbitration proceeding and lack of written opinions would impair disclosure of discriminatory practices, render appellate review ineffective and frustrate the development of the law. The Court disagreed, finding that settlements produced those same results. The arbitral body in question had a sufficient procedure in issuing and making public summary notices of the awards, and the majority of claimants would not be compelled to an arbitration forum. The Court summarily dismissed Gilmer's arguments as nothing more than speculation and a reflection of the bias that the FAA was intended to correct.

"[W]e have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."¹⁵²

The *Gilmer* Court's generalized dismissal of concerns about the efficacy of arbitration in vindicating civil rights violations occurred under specific facts. The plaintiff was a securities broker, licensed as a member of an association with a long history and detailed rules governing the arbitration of disputes.¹⁵³ The Court was not addressing how the nearly

150. On the issue of the bias or inadequacy of arbitration panels to further the goals of the ADEA, the Court recited its perception, until shown otherwise, that the parties would be willing and able to "retain competent, conscientious and impartial arbitrators." *Gilmer*, 500 U.S. at 21. It also noted that the arbitration rules at issue provided for inquiries into arbitrators' backgrounds, preemptory challenges, challenges for cause and disclosure obligations. *Id.* at 30-31 (commenting on 2 CCH NEW YORK STOCK EXCHANGE GUIDE ¶ 2608, at 4314 (Rule 608) (1991), available at <http://www.nyse.com/>).

151. Some commentators have found a contradiction in the Court's acute sensitivity to the "bias" against arbitration contracts compared to its record of a less sensitive approach to the "biases" which are the target of various antidiscrimination laws. See, e.g., Paul L. Edenfield, *No More the Independent and Virtuous Judiciary?: Triaging Antidiscrimination Policy in a Post-Gilmer World*, 54 STAN. L. REV. 1321 (2002); Ronald Turner, *When the Court Makes Law and Policy (with Special Reference to the Employment Arbitration Issue)*, 19 HOFSTRA LAB. & EMPL. L.J. 287 (2002).

152. *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

153. An important part of the history is the series of sexual harassment lawsuits,

minimum wage workers in the convenience store, the fast food restaurant, the local sales counter, the casino or the maintenance department might fare under employer specific rules for arbitrating their civil rights claims. The lower courts have just begun to answer the issues raised in those and other circumstances. Depending on the court, those answers can differ as widely as the types of arbitral forums, and on the most basic matters.

2. Time Limits

One question not presented in the *Gilmer* case is whether a mandatory workplace arbitration agreement can shorten the time limits for bringing a civil rights claim. The answer to that question can be critical in determining not only whether the claim is time barred, but also the remedies available.

Under federal laws, there is a wide range of time periods for filing an employment related civil rights claim depending on the statutory source. Discrimination claims under Title VII, for example, are governed by a 180 day statute of limitation that is extended to 300 days if the claimant files with a state fair employment practice agency such as the Montana Human Rights Bureau.¹⁵⁴ Claims for equal pay, age discrimination, wage and hour violations or denial of family and medical leave rights adhere to the two year time limit imposed by the Fair Labor Standards Act, with the statute of limitation also governing the recovery period for damages.¹⁵⁵ Time limits for filing claims brought under various Civil Rights Acts of the nineteenth century¹⁵⁶ follow the most closely analogous state statute of limitations.¹⁵⁷ Under the Montana Human Rights Act, an employment discrimination claim must be filed within

including class actions, filed against the major brokerage houses in the 1990s. The hard work of people involved as plaintiffs and their lawyers, or indirectly as advocates and journalists, as well as industry representatives, legislators and public servants in federal and state agencies, resulted in wide ranging reforms of arbitration rules and procedures. A well-researched and thorough discussion of those developments and the lawsuits that prompted the reforms of the stock exchange arbitration rules is contained in Susan Antilla, *TALES FROM THE BOOM BOOM ROOM* (2002).

154. 42 U.S.C. § 2000e-5(e)(1) (2003).

155. 29 U.S.C. § 255(a) (2003) (providing a general two year statute of limitations and, if a willful violation of the FLSA is shown, then a three year period).

156. 42 U.S.C. §§ 1981, 1982, 1983, 1985 (2003).

157. In Montana, the three-year period for personal injury claims applies. MONT. CODE. ANN. § 27-2-204(1) (2002); *Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 82-83, 981 P.2d 1, 14 (1997).

180 days after the alleged discriminatory practice occurred or was discovered.¹⁵⁸ A 180 day time limit also applies to unpaid wage claims made under state law.¹⁵⁹

As a general rule, the parties to a contract may agree upon a shorter limitations period for bringing an action than prescribed by statute, provided the time allowed is a reasonable one and there is no statute that prohibits such action.¹⁶⁰ Determining the reasonableness of a time limit for filing a claim under a contract arbitration provision can depend on the amount of time to file a claim, the type of contract at issue, the type of claim involved, and other factors. Time limits may be subject to tolling principles, including those that usually govern workplace civil rights claims in the courts.¹⁶¹ The courts have not agreed on whether, and to what extent, an employer may shorten the statutory periods for filing claims, but severe limitations on the time for filing a claim may be unreasonable on their face.¹⁶²

If a state prohibits any contractual provisions which limit the time period for enforcing rights, state law will apply to void the limitation. In Montana, such a law provides that "[e]very stipulation or condition in a contract. . . which limits the time within which [any party] may thus enforce his rights is void."¹⁶³ The courts have applied this prohibition outside the arbitration

158. MONT. CODE ANN. § 49-2-501(4) (2002). The time limit also applies to claims made under the Governmental Code of Fair Practices. MONT. CODE ANN. § 49-3-315 (2002). The 180 day time limit may be extended a maximum of 120 days if the claimant pursues an employer established grievance procedure. MONT. CODE ANN. § 49-2-501(4)(b) (2002). If an employment claim arose under the fair housing provisions of the Human Rights Act, then a two year statute of limitations would apply to filing a civil action in the appropriate district court. MONT. CODE ANN. § 49-2-510(5)(a) (2002).

159. Wage Protection Act, MONT. CODE ANN. § 39-2-201 (2002).

160. *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1043-44 (9th Cir. 2001) (citations omitted). See B. H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing an Action*, 6 A.L.R. 3d 1197, 1201 (1966).

161. *Zipes v. TWA, Inc.*, 455 U.S. 385, 393 (1982) ("... filing a timely charge of discrimination ... is not a jurisdictional prerequisite ... but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"). Time limits for filing statutory discrimination claims are not tolled by an arbitration proceeding on the same or related claim. *Int'l Union of Elec. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976); *Capers v. Henderson*, 153 F.Supp.2d 846 (E.D. La. 2001).

162. *Ingle v. Circuit City Stores, Inc.*, No. 99-56570, 2003 U.S. App. LEXIS 9157 (May 13, 2003), * 20 (holding time limit provision substantially unconscionable); *Soltani*, 258 F.3d at 1046 (holding 10 day notice provision invalid); *Kraheil v. Owens-Brockway Glass Container, Inc.*, 971 F.Supp. 440, 452-53 (D. Or. 1997) (finding a three day statute of limitation imposed by arbitration agreement unenforceable).

163. MONT. CODE ANN. § 28-2-708 (2002).

context, to insurance contracts which attempt to reduce the time otherwise available to file a claim.¹⁶⁴ As a result, a time limit in an arbitration agreement in Montana that seeks to reduce a statute of limitation available to any of the parties will likely be voidable. However, such a time limit might not invalidate the entire agreement.

3. Costs of Arbitration Proceedings

The Supreme Court recognized in *Green Tree Financial Corp. - Alabama v. Randolph*¹⁶⁵ that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”¹⁶⁶ The *Green Tree* decision however did not invalidate the arbitration agreement because the articulated risk to the plaintiff was too “speculative.”¹⁶⁷ There was no evidence showing the costs to be borne by the plaintiff, the organization that would conduct the arbitration, or even the rules that would govern.¹⁶⁸ *Green Tree* placed on the party opposing arbitration the initial burden of showing that the costs would be prohibitive and suggested making available limited discovery to meet that burden.¹⁶⁹

Since the decision in *Green Tree*, a general view has developed that imposing costs in arbitration similar to amounts required to file a court case is reasonable, but imposition of additional costs raises a colorable issue concerning the validity of the agreement. The District of Columbia Circuit Court of Appeals in *Cole v. Burns International Security Services*,¹⁷⁰ explained that view in a decision issued prior to the *Green Tree* decision.

We are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum. Therefore, it would undermine

164. J. G. Link & Co. v. Continental Casualty Co., 470 F.2d 1133, 1136-37 (9th Cir. 1972); Trammel v. Brotherhood of Locomotive Fireman & Engineman, 126 Mont. 400, 408-410, 253 P.2d 329 (1953) (□Montana legislature has said that any shortening of the time [prescribed in the statute of limitations] is unreasonable.□)

165. 531 U.S. 79 (2000).

166. *Id.* at 90.

167. *Id.* at 91.

168. *Id.*

169. *Id.*

170. 105 F.3d 1465 (D.C. Cir. 1997).

Congress' intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.¹⁷¹

The Ninth Circuit has generally followed that analysis holding that "a fee allocation scheme which requires the employee to split the arbitrator's fees. . . would alone render an arbitration agreement substantively unconscionable"¹⁷² and that "the only valid fee provision is one in which an employee is not required to bear any expense beyond what would be required to bring the action in court."¹⁷³

Agreements which impose costs on workers that are higher than amounts a claimant must bear in a statutory forum will be open to challenge. Those challenges will vary. Some may focus on a failure under the agreement to permit any waiver of fees or costs, as federal and state laws expressly allow.¹⁷⁴ Challenges may even arise for the failure to appoint or arrange for legal counsel for the claimant, also allowed in appropriate circumstances under some civil rights laws.¹⁷⁵ Many arbitral forums have rules which allow for the waiver of fees and costs or reduction of those amounts based on the type of controversy and the circumstances of the complainant. Whether the courts

171. *Id.* at 1484.

172. *Circuit City II*, 279 F.3d at 894; Ingle, * 28.

173. *Ferguson*, 298 F.3d at 786. The court of appeals quoted the holding by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), that an "employer . . . cannot generally require an employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." *Id.* at 687. These decisions have already had practical consequences. Effective November 1, 2002, the American Arbitration Association changed its rules "as a result of recent case law developments . . . , to provide additional safeguards for employees involved in the arbitration process." *AAA Announces Changes Aimed at Fairness for Employees in Arbitration*, AAA NEWS AND EVENTS, Press Release, Oct. 29, 2002, available at www.adr.org. "The primary changes require the employer to deposit the full amount of the anticipated compensation for the arbitrator, unless the employee chooses to pay a portion, and cap the filing fee for the employee at \$125 for employer-promulgated plans." *Id.* (quoting American Arbitration Association Senior Vice President Robert E. Mead).

174. 42 U.S.C. § 2000e-5(f)(1) (2003); MONT. CODE ANN. § 49-2-505(6) (2002).

175. Title VII provides that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security." 42 U.S.C. § 2000e-5(f) (1). See, Janet Boeth Jones, Annotation, *Right of Complainant, Under 42 U.S.C.A. § 2000e-5(f) (1), To Appointment of Attorney in Employment Discrimination Action*, 75 A.L.R. FED. 369 (1985). In Montana, the state agency does not impose any filing fees to proceed with a human rights claim. MONT. CODE ANN. §§ 49-2-504 & 49-2-505 (2002).

consider these substantive rights,¹⁷⁶ which cannot be diminished in the arbitration forum, or merely terms and conditions of employment that can be negotiated by the parties is unclear.¹⁷⁷

4. Discovery Rights

In *Gilmer*, the Court determined that limiting discovery in arbitration proceedings did not by itself abridge the employee's substantive rights under the federal civil rights statute.¹⁷⁸ At issue were New York Stock Exchange rules for arbitration which allowed for document requests, depositions, other information requests and subpoenas. The Court did not address the extent to which an employer may limit discovery. It suggested discovery would be sufficient so long as a party could fairly present the claims.¹⁷⁹ The Court reasoned that limited discovery is traded "for the simplicity, informality, and expedition of arbitration."¹⁸⁰ The fact that arbitrators are not bound by the rules of evidence served, in the Court's view, as a "counterweight" to reduced discovery.¹⁸¹

The guiding principle should be that while employees are not entitled to "unfettered discovery" in arbitration, they are "at least entitled to discovery sufficient to adequately arbitrate their statutory claims, including access to essential documents and witnesses."¹⁸² If discovery procedures are part of a pattern of providing undue advantages to the employer, then those procedures may not withstand a legal challenge.¹⁸³

176. See, e.g., *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604-12 (3d Cir. 2002) (reversing district court order compelling arbitration and remanding for discovery on the issue of the estimated costs of arbitration and the plaintiff's ability to pay in order to determine whether the cost splitting provision of the agreement deterred effective vindication of the rights at issue).

177. For a further discussion on the cost shifting issue, see, e.g., Clara H. Saafir, *To Fee or Not to Fee: Examining Enforceability of Fee-Splitting Provisions in Mandatory Arbitration Clauses in Employment Contracts*, 48 LOY. L. REV. 87 (2002); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001).

178. The statute at issue in *Gilmer* was the Age Discrimination in Employment, 29 U.S.C. §§ 621-634 (2003).

179. *Gilmer*, 500 U.S. at 31.

180. *Id.*

181. *Id.*

182. *Ferguson*, 298 F.3d at 787 (quoting *Armendariz v. Found. Health Psychare Servs.*, 6 P.3d 669, 684 (Cal. 2000)).

183. See *id.* (finding the limited discovery was part of an "insidious pattern" of providing undue advantages to employer in the arbitration agreement).

5. Remedies

The Civil Rights Act of 1991 expanded the available remedies in employment discrimination cases under various federal laws, allowing a claimant to seek not only to be “made whole,” but also allowing recovery of compensatory and punitive damages.¹⁸⁴ Claims under the FLSA allow for the recovery of liquidated damages, i.e., a doubling of back pay awards, in situations where the employee proves the violation was willful.¹⁸⁵ Time periods for purposes of calculating damage awards vary. A continuing violation may reach back years.¹⁸⁶ A claim for front pay may extend years into the future.¹⁸⁷ The Montana Human Rights Act neither permits an award of punitive damages,¹⁸⁸ nor limits the amount of damages that may be awarded to “rectify any harm, pecuniary or otherwise, to the person discriminated against.”¹⁸⁹ Monetary relief for civil rights violations in the workplace varies widely, depending on the statutory basis and the circumstances.

Separate from any damage claims, civil rights statutes permit the claimant to obtain various forms of equitable relief if illegal discrimination or other violation of the law is proven. Injunctions, restraining orders, requirements to take affirmative actions to correct the effects of the violation or to prevent future violations, are all available remedies. In Montana, when an employee establishes a violation of the Human Rights Act¹⁹⁰ or Governmental Code of Fair Practice,¹⁹¹ the law requires that an order issue enjoining the employer from engaging in the discriminatory practice in the future.¹⁹²

Arbitration cannot deny a claimant monetary relief that would have been available in court under the applicable law nor can it prevent an employee from obtaining appropriate

184. 42 U.S.C. § 1981a(b)(3) (2003). The statute places limitations on the amount of certain types of compensatory damages and on punitive damages. The “caps” are based on the number of persons employed by the employer. *Id.*

185. 29 U.S.C. § 216(b).

186. See *Nat’l. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 124-125 (2002).

187. *Pollard v. E.I. Dupont De Nemours & Co.*, 532 U.S. 843, 848 (2001) (holding that front pay award, i.e., damages to be paid for compensation lost during period after judgment and before reinstatement or in lieu of reinstatement, was not subject to limitations set out in 42 U.S.C. § 1981a(b)(3)).

188. MONT. CODE ANN. § 49-2-506(2).

189. MONT. CODE ANN. § 49-2-506(1) (b).

190. MONT. CODE ANN. §§ 49-2-301 to 311.

191. MONT. CODE ANN. §§ 49-3-201 to 209.

192. MONT. CODE ANN. § 49-2-506(1).

injunctive or affirmative relief upon proof that a violation of the law occurred. Attempts to eliminate punitive damages, to limit recoveries to contractual sums, to curtail the period used for calculating a damage award, and other efforts to dilute the remedial purposes of a statute have been rejected.¹⁹³

Consistent with the federal policies favoring arbitration, the courts will consider whether an offensive provision can be struck from the agreement, leaving the remainder in tact and enforceable.¹⁹⁴ Reformation of the contract by severing the unlawful term may occur, depending on the degree to which the overall agreement is tainted by one or more unenforceable provisions.¹⁹⁵

6. Attorney Fees

A critical component of the federal and state laws allowing enforcement of civil rights laws has historically been the right of the prevailing employee to recover his or her attorney fees and costs after establishing a violation of the law. Employees who establish prevailing party status are entitled to recover those amounts as one of the remedies for illegal discrimination.¹⁹⁶ In enacting 42 U.S.C. §1988, Congress acknowledged that private

193. See, e.g., *Circuit City II*, 279 F.3d at 891; *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001) (severing arbitration provision limiting punitive damages where parties had included severability clause); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1061, 1062 (11th Cir. 1998) (affirming refusal to compel and holding arbitration clause unenforceable where it attempted to limit or curtail statutory remedies); *Underwood v. Chef Franciso/Heinze*, 200 F. Supp. 2d 475, 481 (E. D. Pa. 2002) (holding that arbitration agreement which attempts to impose higher and more difficult burden of proof on Title VII claimant is unenforceable as attempt to dilute statutory rights).

194. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (holding that where arbitration agreement includes severability clause, courts should reconcile federal policy favoring arbitration with important rights created and protected by federal civil rights legislation by severing from the arbitration agreement those provisions which impair substantive rights).

195. There is a split among the federal courts about whether severance or avoidance of the agreement is the proper action in relieving the employee of an unenforceable provision. Compare *Perez v. Globe Airport Sec. Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), *vacated*, 294 F.3d 1275 (explaining analysis that must be done to void the arbitration clause), with *Gannon*, 262 F.3d at 682-83 (explaining analysis to sever offending clause, particularly when there is a severability provision), with *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (explaining that specific limiting provisions may be enforceable but if arbitration agreement as a whole shows "systemic effort to impose . . . an inferior forum," then entire agreement is unenforceable).

196. *Pollard*, 532 U.S. at 847 (plaintiffs who prevail in employment discrimination cases, "traditionally have been entitled to such remedies as injunctions, reinstatement, backpay, lost benefits, and attorney's fees under [Title VII]").

enforcement was critical to vindicating the public policies embodied in the civil rights laws.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.¹⁹⁷

Montana has acknowledged this key relationship between enforcement of an individual's rights and vindication of the fundamental public policies at the core of its human rights laws.¹⁹⁸ Holding that claimants in civil rights cases play an important role as private attorneys general, the state supreme court has explained that the "purpose of fee shifting provisions in civil rights laws like the Montana Human Rights Act, is to encourage 'meritorious civil rights litigation' and ensure 'effective access to the judicial process' for persons with discrimination grievances."¹⁹⁹

In addressing arbitration agreements which prohibit an employee from recovering his or her fees and costs after establishing a violation of federal discrimination laws, a number of courts have refused to uphold those arbitration clauses. That type of limitation would defeat the remedial purposes of the statutes.²⁰⁰ To do otherwise would appear to violate the basic

197. S. REP. NO. 1011, 94th Cong., 2d. Sess. 2, *reprinted in* 1976 U.S.C.C.A. 5908, 5910.

198. *Laudert v. Richland County Sheriff's Dept.*, 2001 MT 287, ¶ 26, 307 Mont. 403, ¶ 26, 38 P.2d 790, ¶ 26.

199. *Id.*

200. *See, e.g., McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2002) (arbitration clause prohibited recovery by employee of her fees and costs in any situation and was therefore unenforceable); *Perez v. Globe Airport Sec. Servs.* 253 F.3d 1280 (11th Cir. 2001) (arbitration clause requiring equal sharing of all costs and fees associated with proceeding unenforceable since it denied employee access to remedies specifically available under Title VII); *Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237 (D.C. Conn. 2002) (terms of arbitration agreement "cannot be said to provide satisfactory forum for vindication of [plaintiffs] federal rights" where agreement impairs remedy to recover fees and costs if she establishes her claim); *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 616 (D.C. S.C. 1998) (arbitration agreement that denies Title VII plaintiff the right to recover attorneys fees is void as a matter of public policy); *DeGaetano v. Smith, Barney, Inc.*, 983 F. Supp. 459, 469 (S.D. N.Y. 1997) (awarding attorneys fees following plaintiffs victory in arbitration of a Title VII claim notwithstanding the provision that each party shall bear their own costs because "an attorney's fee award [is] one of the principal remedies afforded by Title VII, and one of the chief statutory mechanisms designed to effectuate Congress's policy goals of enforcement and deterrence"); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196, 1204 (D.C. Colo. 2001). *See also* *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1994) (in a case outside the civil

Gilmer principle that arbitration effects only a change in the forum and is not an instrument to undermine federal policies or to diminish federally recognized rights.

C. Powers of Civil Rights Enforcement Agencies Not Limited by Arbitration Agreements: EEOC v. Waffle House, Inc.

The federal policy favoring arbitration does not extend beyond the claims subject to an arbitration agreement or beyond the parties to the agreement.²⁰¹ In terms of workplace civil rights claims, that basic principle—that a contract cannot bind a nonparty—controls in preventing mandatory arbitration agreements from impeding the statutory role played by the EEOC and other agencies in enforcing policies prohibiting illegal discrimination. In *EEOC v. Waffle House, Inc.*, the Supreme Court rejected the notion that mandatory arbitration agreements imposed limitations on the remedies that could otherwise be sought by enforcement agencies.²⁰² “[T]he proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority” to pursue any relief authorized by the applicable law, regardless of the forum that the employer and employee have chosen to resolve their disputes.²⁰³

In *Waffle House*, the lower court ruled that the EEOC was prohibited from pursuing any “victim-specific relief” in a disability discrimination case due to an enforceable arbitration agreement between the charging employee and his employer.²⁰⁴ The EEOC could pursue injunctive remedies to vindicate the public interest, but not back pay, punitive damages or other monetary relief.²⁰⁵ The Supreme Court disagreed.²⁰⁶

The Supreme Court held that the ADA, as well as Title VII, “unambiguously” conferred authority upon the EEOC to obtain,

rights area, holding that claimant’s rights to recover fees was important to effectuate federal policies underlying the statute and arbitration agreement prohibiting such recoveries contravened statute, could not be severed, and rendered agreement unenforceable).

201. *Mitsubishi*, 473 U.S. at 625-26 (stating “the first task of a court asked to compel arbitration. . . is to determine whether the parties agreed to arbitrate that dispute”). The FAA is “at bottom a policy guaranteeing the enforcement of private contractual arrangements.” *Id.*

202. 534 U.S. 279 (2002).

203. *Id.* at 294.

204. *Id.* at 284.

205. *Id.* at 285.

206. *Waffle House*, 534 U.S. 279, 285 (2002).

by agency action in the courts, any of the various types of relief permitted under the statutes.²⁰⁷ Congress had placed no language in those civil rights laws to suggest that an arbitration agreement between private parties materially changed the EEOC's statutory functions or powers.²⁰⁸ At the same time, the FAA does not address enforcement by public agencies.²⁰⁹ The EEOC was not a party to the arbitration agreement.²¹⁰ In the event the EEOC successfully obtained victim-specific remedies in its action, the courts had available methods to prevent any double recovery for the individual whose rights were violated.²¹¹ Limiting the remedies available to the EEOC would diminish the agency's duties without any statutory authority, Justice Stevens explained, and would turn "what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies."²¹²

The impact of the *Waffle House* decision on the utility of mandatory workplace arbitration agreements is unclear. The majority of the Court looked at the EEOC's historic practice of filing suit in only a fraction of the charges (1/2 of 1%) that employees file, noting that in the year 2000, a total of 79,896 charges were filed. The agency made reasonable cause findings in 8,248 of those proceedings, but filed suit or intervened in only 402 cases.²¹³ In that context, the Court determined there would be "a negligible effect on the federal policy favoring arbitration."²¹⁴

The dissent saw a much darker picture, claiming that the decision "eviscerates" the private arbitration agreement, reducing it to "all but a nullity."²¹⁵ As Justice Thomas viewed the *Waffle House* decision, it places employers requiring those agreements "at a serious disadvantage" and "discourages the use of arbitration agreements" generally.²¹⁶ Neither forecast seems precise.

The Court failed to consider the practical effect of its ruling

207. *Id.* at 287.

208. *Id.* at 288.

209. *Id.* at 289.

210. *Id.*

211. *Waffle House*, 534 U.S. 279, 289 (2002).

212. *Id.* at 295.

213. *Id.* at 290 n.7.

214. *Id.*

215. *Id.* at 309 (Thomas, J., dissenting).

216. *Waffle House*, 534 U.S. 279, 310 (2002).

on employers.²¹⁷ An arbitration agreement cannot limit an employee's right to file a charge of discrimination.²¹⁸ The EEOC refers nearly all discrimination charges to authorized state enforcement agencies for investigation and processing.²¹⁹ In Montana, claims filed with the EEOC are referred to the state Human Rights Bureau, or alternatively, claims filed with the Human Rights Bureau are dual filed automatically with the federal agency whenever the case meets the jurisdictional minimum.²²⁰ In conducting the investigation, the Human Rights Bureau or other FEP agencies have authority to compel the production of information if a party does not voluntarily cooperate.²²¹ The state agencies also may have separate authority, under state law, to initiate actions on behalf of the employee if sufficient evidence of an illegal practice is found.²²² From the time an employee files a charge with the state until the matter is concluded, the possibility of a civil action by the state agency remains open.

Under *Waffle House*, the employer must defend against an administrative charge of discrimination regardless of any arbitration agreement with the charging party.²²³ An answer

217. The pessimistic view of the pro-FAA dissent in *Waffle House* falters to a greater degree than the majority downplays the potential deterrence to workplace arbitration agreements. The comment that the decision "sets this Court on a path that has no logical or principled stopping point" and will undermine not only arbitration but settlement agreements in discrimination cases is at best hyperbole. *Waffle House*, 534 U.S. at 311-312. By 1997, years before *Circuit City* resolved that workers were not generally exempt from FAA coverage, the American Arbitration Association already estimated that "more than 3.5 million employees [were] covered" by agreements designating the AAA to administer the arbitration proceedings. *Id.* at 296 n.11. That trend has not diminished. In 2000, "more than 500 employers and five million employees" were relying upon the AAA's employment arbitration programs. See American Arbitration Association, 2000 Annual Report 28 (2001), available at http://www.adr.org/upload/LIVESITE/About/annualreports/annual_report_2000.pdf.

218. See *Waffle House*, 534 U.S. at 280-83.

219. 42 USC § 2000e-8(b). The state enforcement agencies are known as "fair employment practice agencies" or "FEP agencies."

220. An extended discussion of the allocation of responsibilities for processing employment discrimination claims under the E.E.O.C. worksharing agreements with qualified state agencies is found in *EEOC v. Commercial Office Products, Inc.*, 486 U.S. 107, 109-118 (1988). See also *Astoria Fed. Sav. & Loan Assoc. v. Solimino*, 501 U.S. 104, 106 (1991) (explaining that claimant required by law to file discrimination charge with state agency under worksharing agreement is not precluded by an adverse agency decision from bringing later federal court action); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1175-1177 (9th Cir. 1999) (explaining procedures under the E.E.O.C. worksharing agreements with state agencies and effect of "dual filed" complaints).

221. MONT. CODE ANN. § 49-2-203(2002).

222. MONT. CODE ANN. § 49-2-210 (2002).

223. *Waffle House*, 534 U.S. at 280-83.

must be filed, discovery must be answered and witnesses or other employees must be made available to answer questions. An employer cannot use an arbitration agreement to prevent governmental review and processing of a civil rights charge, nor can it prevent a public report on a violation if found.²²⁴ On the other side of the ledger, the *Waffle House* decision provides at least some protection of the interests of employees and the public at large in preventing or eliminating illegal employment discrimination.

The guiding principle established by *Waffle House* is not about how many lawsuits the EEOC will bring in the future or how many employers will be more reluctant to adopt mandatory arbitration clauses as a requirement for joining their workforce. Neither of those numbers may increase noticeably. Instead, the decision stands as a forceful reminder. An arbitration provision may not serve as a barrier to employees reporting or filing claims with the governmental agencies charged with the duty of processing and investigating claims of illegal discrimination and with vindicating the public interests if violations are found.

V. CONSIDERATIONS IN IMPLEMENTING PROCEDURES FOR ARBITRATING CIVIL RIGHTS CLAIMS IN THE WORKPLACE

Arbitration is a form of alternative dispute resolution which has been heralded by some as a way to save time, money and energies in resolving disputes.²²⁵ Others are muted in their praise, believing an arbitral forum is one alternative to traditional legal proceedings that deserves consideration. For arbitration to be effective as an alternate forum to workplace disputes, all parties must realize benefits. There must be gains for the employer and the employee in using this method of alternative dispute resolution. This section is intended to raise issues for consideration in deciding whether a pre-dispute arbitration agreement is appropriate and in drafting or entering into such an agreement.

As a general matter, if an employer uses a mandatory pre-dispute arbitration procedure to attempt to deter the filing of

224. See MONT. ADMIN. R. 24.9.212 (2002) which advises that information obtained in the investigation of a human rights complaint will be public information unless restricted from disclosure by constitutionally protected privacy interests.

225. See Sarah Johnston, *ADR In The Employment Discrimination Context: Friend or Foe To Claimants*, 22 HAMLINE J. PUB. L. & POL'Y 335, 335-37 (2001) (noting how ADR has been taught in law schools).

meritorious claims, limit available remedies, or otherwise tip the scale unreasonably in their favor, they might find themselves in a more complicated and expensive set of proceedings.²²⁶ If employees enter into mandatory arbitration agreements without reading what rights are at stake and without being informed, then they too may find themselves at a similar disadvantage.²²⁷

Arbitration can be an efficient and effective method of resolving workplace disputes for employers, employees²²⁸, and the public at large.²²⁹ The decision whether to enter into a mandatory pre-dispute arbitration agreement should not be taken lightly. Thoughtful consideration should be given to a process that requires arbitrating a dispute and what rights may or may not be relinquished.

Limiting costs²³⁰ in resolving a workplace dispute should

226. See *supra* parts III and IV. Drafting a provision that sets the correct tone and context for a mandatory arbitration agreement should help in enforcing the agreement if challenged. The following is an example of the type of "purpose" clause that may be useful.

The intent of this agreement is to provide a change in forum and not a change in substantive rights under federal or state statutory protections. If any provision in this agreement is construed by a court (of competent jurisdiction) as unenforceable or as having a discriminatory intent or effect, that provision is deemed severable and void for the purposes of this agreement and shall have no effect on the other provisions of this agreement.

227. The possibility of a job, especially in hard times, may cloud an applicant's view at the start of the employment process and be far costlier than expected in the long run. The best advice is to know what one is signing before signing. Knowledge of the contractual provisions is important for workers, customers, borrowers and consumers alike. Asking questions, finding information and making an informed decision need not be avoided.

228. See Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998) (opining that mandatory arbitration may be beneficial for employees).

229. Scott Atlas, *Have You Ever Tried to Make Up Your MindC About Arbitration?* A.B.A. J. SEC. LIT., Vol. 29 No. 1, Fall 2002, at 1 ("As litigation has become increasingly complex, potential damage awards have increased, and legal representation has become costlier, arbitration seemed like a panacea."). However, the American Bar Association Section of Litigation has recognized that little has been done in the way of empirical study to compare the relative merits of arbitration over traditional litigation. To answer outstanding issues concerning such a comparison, the Section has developed a task force to research and report on the arbitration process. They intend to collect data on the perceptions and experiences of attorneys and litigants regarding concerns about arbitration such as cost, fairness, timeliness, predictability of result, and other considerations. *Id.* at 69; Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration For Discrimination Claims*, 31 RUTGERS L.J. 399, 401 (2000) (providing comprehensive discussion of the disadvantages of mandatory arbitration for employers).

230. A non-profit organization called Public Citizen states that there is no research to substantiate the perception that arbitration saves costs. This group disputes that costs are saved. Public Citizen, *Cost of Arbitration: Executive Summary* (May 1, 2002),

benefit both parties. A speedier resolution of a legal controversy between employers and employees is a savings, not only in expenses but also in the personal and emotional costs that often accompany litigation. Economies are possible in eliminating excessive motion practice which can occur in the courts. As a general rule, less discovery occurs in an arbitration proceeding.²³¹ On this point alone, considered by many to be the costliest part of a lawsuit, there may be direct and indirect savings in the fewer dollars spent on discovery and in the fewer hours of work and personal time lost in prosecuting or defending the matter. The limited avenues for appeal and greater finality should also conserve costs. Finally, in some circumstances, parties can proceed to arbitration without the need for outside attorney representation. That will depend on the issues raised and often on the type of dispute. It may offer, in some cases, a substantial cost savings.²³²

While the courts are not in complete agreement about how to pay the costs of the arbitration²³³, employers need to be aware that if the costs associated with the arbitration effectively impair an employee's right to bring a meritorious claim, a court battle may ensue and the employer might end up paying the arbitrator's fees and costs, in addition to absorbing the expenses of that collateral litigation. To avoid this potential problem a pre-dispute arbitration provision should limit the costs imposed upon an employee to an amount no greater than what they pay in filing an action in district court.

An arbitral forum may offer greater access than a court to employees who have claims arising from the terms and

available at www.lawmemo.com/arb/res/cost.htm; cited in Atlas, *supra* note 229, at 2; Green, *supra* note 230, at 212.

231. See *supra* part IV.B.4. Reasonable limitations on discovery are probably allowable. However, if the discovery rules unreasonably favor the employer, the provision is subject to challenge. Limited discovery and the greater ability of employers to control that process might be one of the greatest hindrances to claimants.

232. There is a countervailing argument to proceeding without outside legal counsel, particularly in civil rights cases. The disadvantage will often work against the employee who has no ready access to attorneys, while employers in most instances will at least have access. For either side, the absence of experienced counsel in the area can lead to unintended consequences that are far costlier—in terms of lost value of a claim or in terms of greater liabilities—than the short term thriftiness of representing yourself in any legal proceeding, including arbitration.

233. See generally Saafr, *supra* note 178, at 98; David R. Wade & Curtiss K. Behrens, *Opening Pandora's Box: Circuit City v. Adams and the Enforceability of Compulsory, Prospective Arbitration Agreements*, 86 MARQ. L. REV. 1 (2002).

conditions of their work.²³⁴ If the arbitration provision covers submission of all workplace claims, the employee can benefit by having all claims in a single forum. Employers may not realize the same advantage. The alternate remedies available under state and federal antidiscrimination laws illustrate the differences. In a claim under the Montana Human Rights Act, punitive damages are not available and affirmative relief can be subject to statutory limits.²³⁵ At the federal level, punitive damage awards are expressly permitted under the Civil Rights Act of 1991, and the court's full equitable powers are available as a remedy against future violations.²³⁶ An employee must file a federal claim separate from any state human rights proceeding to seek full relief, an occurrence which may happen, if at all, after a full hearing or trial under state law. If arbitration offers a single opportunity to have all claims heard, the employer may face both compensatory and punitive damages, as well as the full range of equitable remedies, in the same action.²³⁷

Employees may benefit from the relative simplicity in using arbitration procedures. That simplicity, however, may result in arbitration of disputes that would better be handled as ordinary grievances and would not likely be filed in court.²³⁸ To avoid arbitration of those workplace disputes, an employer might consider a threshold claim value before either party may invoke arbitration.²³⁹ For employees with discrimination claims, that prerequisite should have little impact on an ability to seek relief for the violation of a fundamental right, even where the dollar value of the loss is difficult or impossible to measure. The right to file a charge with a state or federal administrative agency remains unaffected, regardless of the value of the claim or the existence of any mandatory arbitration agreement in the

234. See Johnston, *supra* note 225, at 373-74.

235. MONT. CODE ANN. § 49-2-506 (2002).

236. 42 U.S.C. § 1981aa(1) (1994).

237. At the same time, employees are not foreclosed from filing a claim with the Montana Human Rights Bureau, seeking injunctive and affirmative relief in that forum. See *supra* Part IV.C.

238. The principles underlying awards of attorney fees and costs to prevailing parties in civil rights cases are intended to help limit frivolous or groundless claims. See *supra* Section IV.B.6. Under those principles, a claimant can be assessed the fees and costs incurred by the defense if the claim was "frivolous, unreasonable or groundless" and the claimant "continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC* (1978), 434 U.S. 412, 422 (1978); *McCann v. Trustees, Dodson School Dist.*, 249 Mont. 362, 364, 816 P.2d 435, 437 (1991).

239. For example, an employer could provide that arbitration is not available for claims involving damages of less than \$5,000.

workplace.²⁴⁰

For employers who may be concerned about excessive costs of claims with no merit, providing pre-dispute mandatory arbitration might not be the best solution. Some perceive that arbitrators are reluctant to grant summary judgments, while the courts have increasingly used that avenue to resolve claims that cannot meet basic proof elements, or to resolve issues in favor of the plaintiffs that cannot reasonably be disputed. There is a perception that some arbitrators, regardless of the merits of the claim, tend to “split-the-baby.”²⁴¹ These concerns might be eliminated by allowing either party to “opt-out” of the arbitration proceeding after a dispute arises. They also may be eliminated by incorporating within the arbitration agreement established rules that closely follow many civil procedures, including summary disposition and reference to basic evidentiary and legal standards.

Requiring an arbitrator or panel of arbitrators to be qualified in the field, with a demonstrated expertise in employment or civil rights law, is also an option. Each of these refinements to a generalized, unspecific arbitration agreement may bolster the equivalency of the forum in terms of substantive rights, while addressing the needs of a particular work force. There is one caution. The more creative arbitration agreements, like the more aggressive ones, are at greater risk of prompting litigation over the arbitration agreement itself.

Some commentators believe that large employers²⁴² benefit by being “repeat players” in arbitration proceedings. Although balanced in the labor-management area by the countervailing weight of union organizations, no individual employee can expect to draw on the assistance of the same arbitrator or even the same arbitral entity time and again. Employing the same arbitrators over several years can become problematic because the employer often develops a “business” relationship rather than an adjudicatory one with the arbitrator, creating an appearance of a conflict of interest on the part of the arbitrator that suggests bias. From both the employer’s and the employee’s perspective, impartiality is critical. Choosing a qualified and credible²⁴³ arbitrator who is familiar with a

240. See *supra* part IV.C.

241. See Atlas, *supra* note 229, at 69.

242. Smaller employers would tend not to be repeat players.

243. It is important that both the employee and the employer have faith in the arbitrator. If both parties feel that the arbitration proceeding provides them with their

particular area of law is important for an effective arbitration.²⁴⁴ Rules incorporated into any arbitration agreement should require that any selected arbitrator abide by the Arbitrators' Code of Ethics.²⁴⁵

There are a variety of model arbitration procedures. Some are better than others.²⁴⁶ If an employer adopts a particular model and requires compliance with a specific set of rules—such as the Uniform Arbitration Act or the rules of the American Arbitration Association, New York Stock Exchange, National Association of Securities Dealers, National Arbitration Forum or some other institution—the employer should be familiar with those rules. Employers should provide all employees and employment applicants with the rules, and an adequate opportunity to review them, before the request to sign an agreement. While an employer and employee might want to agree to some provisions in the model rules, others might not accomplish the mutual goals of an effective arbitration proceeding. Adaptation of rules incorporated into an arbitration agreement may be more appropriate in a post-dispute setting, when the particulars of the claim are known.

In addition to the relative interests of the employer and the employee, the public interests should weigh into the considerations regarding mandatory pre-dispute arbitration

fair “day in court,” challenges to the proceeding might well be eliminated. Further, if the resolution involves an ongoing working relationship, it is important that both parties embrace the reasoned solution of the arbitrator. See Carrie Menkel-Meadow, *Ethics Issues In Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 950-951 (discussing ethical issues in arbitration: It is “essential that some forms of transparency, disclosure, rules, sanctions, and consequences will be necessary for arbitration to maintain any semblance of legal legitimacy and justice”).

244. In *Gilmer*, the Court stated that a provision whereby parties are informed of the employment histories of the arbitrators and that they be permitted to make further inquiries into the arbitrator's backgrounds will help avoid biased arbitrators. A procedure allowing peremptory challenges and unlimited challenges for cause will help avoid a biased arbitrator. The Court in *Gilmer* noted that the FAA protects against bias by permitting a court to overturn arbitration awards “[w]here there was evident partiality or corruption in the arbitrators.” *Gilmer*, 500 U.S. at 30-31 (quoting 9 U.S.C. § 10(b)).

245. See generally Menkel-Meadow, *supra* note 243.

246. The Montana Supreme Court has suggested that the SEC-approved model arbitration procedures (NYSE and NASD rules) “are not unconscionable as a matter of law.” *Chor*, 261 Mont. at 149-50, 862 P.2d at 30. See also *Mueske*, 260 Mont. 207, 859 P.2d 444 (1993), for a relatively detailed discussion of the Securities Industry Conference on Arbitration and the ensuing industry rules intended “to maintain fair and efficient forums for the arbitration of disputes between members and investors.” *Id.* at 214-215, 859 P.2d at 449.

proceedings. Clearly, the courts have decided that the FAA reflects a congressional expression that arbitration of disputes serves the public interest. States that have adopted the Uniform Arbitration Act have also determined that a fair arbitration forum is in the public interest. Tensions arise because the public also has a separate, overriding interest in preventing or eliminating illegal and discriminatory practices.

Public concerns exist about a net loss to the public if civil rights disputes are handled in the privacy of arbitration, away from an open and accessible forum.²⁴⁷ There is a concern as well for the loss in published precedent that may result from a substantial increase in arbitration of these claims. The lack of publicity associated with most arbitration proceedings may impair the development of discrimination jurisprudence through precedent and deny valuable guidance about rights and responsibilities under these laws.²⁴⁸ Perhaps most important, there is a concern that the trend to arbitration is an effort to privatize civil rights enforcement. Following that view, arbitration places most civil rights issues in the workplace outside the realm of public policy and into a category of routine business transactions, handled by all parties with attention only to their self-interests and costs, rather than a commitment to underlying values and goals in a democratic society.²⁴⁹ The eventual impact of arbitration on effective civil rights enforcement remains unknown. Too many issues remain unanswered; too few standards have been established in the law.

Many of the questions and concerns raised about mandatory pre-dispute arbitration agreements, and the risks of litigation over those agreements, can be avoided by agreeing to arbitrate after a dispute arises. Offering post-dispute arbitration can permit the employer and the employee to gain the benefits of arbitration and avoid the detriments inherent in a mandatory pre-dispute arbitration procedure. Employers should offer

247. See, e.g., Johnston, *supra* note 225, at 379.

248. See EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, *supra* note 53 (describing how “the public nature of the judicial process enable[s] the public, higher courts, and congress to ensure that the discrimination laws are properly interpreted and applied”); see also Antilla, *supra* note 153.

249. See generally Kloss, 2002 MT 129, ¶¶ 61, n.3, 62, 293 Mont. 512, ¶¶ 61, n.3, 62, 977 P.2d 989 ¶¶ 61, n.3, 62 (Nelson, J., specially concurring) (citing law review articles discussing “corporate abuse of ordinary citizens and small business people by way of the inclusion of mandatory arbitration clauses in contracts of adhesion”).

meaningful and mandatory internal grievance procedures. Employees are well advised to implement them. If the dispute is not resolved, both parties can then consider whether arbitration offers a suitable method of resolving the controversy rather than forcing either party into mandatory arbitration. The employer might have an arbitration procedure already outlined, but should be open to the possibility of negotiating terms with the employee to reach an agreement. Using that option, both parties can agree to procedures which will allow them to resolve their dispute in an efficient and cost effective manner, and one that will not be subject to challenge.

VI. CONCLUSION

The momentum of the federal law in enforcing the FAA policy requiring the courts to assure equal treatment of arbitration agreements as enforceable contracts has now moved to encompass all employment agreements—not just with the highly compensated executive, the highly skilled professional or the union member. The service sector employee, the clerk or receptionist, the counter salesperson, the day laborer and all other workers, save those in the transportation industry, may be required to submit any claims arising from their employment, even federal and state civil rights claims, to an arbitral forum.

Today and tomorrow, the focus in mandatory workplace arbitration will be on drafting (and litigating) a new generation of employment agreements to determine if a pre-dispute mandatory arbitration provision is enforceable. It is unlikely that most of the issues of enforceability will be answered quickly or within even the next 10 to 20 years, given the variety of employers, employees, arbitration clauses, arbitral forums and the differing views of the courts. For the practicing Montana attorney, or their employer or employee client, at least one guiding principle should help avoid the risk of bearing the expenses involved in litigating unanswered questions in this area. In terms of statutory employment rights, especially claims alleging fundamental civil rights violations, providing equivalent protections in arbitration—the change in forum only and not in rights—will substantially decrease the likelihood of an unenforceable agreement.

